

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**





*Affidavit*

# 77-6165

To be argued by  
NATHANIEL L. GERBER

12/16

## United States Court of Appeals FOR THE SECOND CIRCUIT Locket No. 77-6165

B  
P/S

ANNA SELMA VINJE MORPURGO,  
*Plaintiff-Appellant,*  
—against—

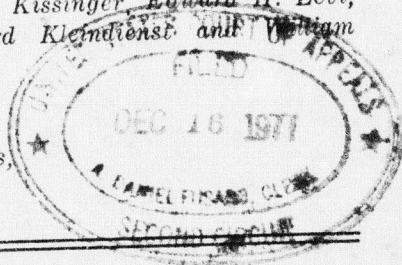
UNITED STATES OF AMERICA, NEW YORK CITY BOARD OF HIGHER  
EDUCATION, MASSACHUSETTS INSTITUTE OF TECHNOLOGY,  
PRINCETON UNIVERSITY, and RICHARD KLEINDIENST, WILLIAM  
SAXBE, EDWARD H. LEVI, HENRY KISSINGER, MARY MOTHERSILL,  
ALFRED A. GIARDINO, ROBERT J. KIBBEE, DAVID NEWTON,  
HAROLD M. PROSHANSKY, HANS J. HILLERBRAND, ARNOLD  
KOSLOW, ABRAHAM EDEL, JULIUS ELIAS, GERALD MYERS,  
ANDREW J. McLAUGHLIN, JASON SAUNDERS, VIRGINIA HELD,  
PETER CAWS, RUDOLPH GREWE, C.S. HONG, ROBERTA THORNTON,  
NORMA REES, NAPTHALI LEWIS, KURT SCHMELLER,  
*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

### BRIEF FOR FEDERAL DEFENDANTS-APPELLEES

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United States Court of Appeals  
FOR THE SECOND CIRCUIT

Docket No. 77-6165

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ANNA SELMA VINJE MORPURGO,  
*Plaintiff-Appellant,*  
—against—

UNITED STATES OF AMERICA, NEW YORK CITY BOARD OF  
HIGHER EDUCATION, MASSACHUSETTS INSTITUTE OF  
TECHNOLOGY, PRINCETON UNIVERSITY, and RICHARD  
KLEINDIENST, WILLIAM SAXBE, EDWARD H. LEVI,  
HENRY KISSINGER, MARY MOTHERSILL, ALFRED A.  
GIARDINO, ROBERT J. KIBBEE, DAVID NEWTON,  
HAROLD M. PROSHANSKY, HANS J. HILLERBRAND,  
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GREWE, C.S. HONG, ROBERTA THORNTON, NORMA  
REES, NAPTHALI LEWIS, KURT SCHMELLER,  
*Defendants-Appellees.*

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**BRIEF FOR FEDERAL DEFENDANTS-APPELLEES**

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**Preliminary Statement**

Plaintiff-appellant, Anna Selma Vinje Morpurgo, appearing *pro se*, appeals from a judgment entered in the United States District Court for the Southern District of New York on August 2, 1977. The judgment is predicated upon two opinions of the Honorable Edward Weinfeld, District Judge, filed November 18, 1976 and July

27, 1977 respectively. This brief is submitted in behalf of defendants-appellees United States of America, Henry Kissinger, Edward Levi, William Saxbe and Richard Kleindienst (the "federal defendants") named as defendants in one of two actions within the scope of this appeal, *Morpurgo v. United States of America, et al.*, 75 Civ. 3840 (EW). Judge Weinfeld dismissed the second amended complaint as to the federal defendants in his opinion entered November 18, 1976. That opinion is reported at 423 F. Supp. 704.

### **Issues Presented for Review**

1. Did the District Court properly dismiss the complaint as to the United States and the individual federal defendants in their official capacity for failure to state a claim over which the Court had subject matter jurisdiction?

2. Did the District Court properly dismiss the complaint as to the individual federal defendants for failure to state a claim upon which any relief could be granted or to satisfy the pleading requirements of Rule 8(a)(2) of the Federal Rules of Civil Procedure?

### **Statement of the Case**

This action was commenced on August 6, 1975 with the filing of a complaint which charged a wide ranging conspiracy against numerous defendants from various universities at which plaintiff was previously enrolled or to which she had made application as well as various individuals and groups with whom she had had contact in that context. In addition, plaintiff named the federal defendants who were accused of having participated in the conspiracy in retribution for her prior civil rights activities.



It appears that plaintiff was formerly employed by the New York City Board of Higher Education ("BHE") as an adjunct lecturer at Queensborough Community College, a division of the City University of New York ("CUNY") and was enrolled in a doctoral program at CUNY. Her allegations of wrongful conduct, while seemingly without limit, originate for the most part with CUNY's termination of her studies leading to a doctorate degree in philosophy and its refusal to renew her contract as an adjunct lecturer. Thereafter, as she sought admission to various other educational programs and research projects, her charges were broadened to include all who came within her path and the federal defendants with whom plaintiff never had any contact but who nonetheless were presumed to have organized and led the conspiracy. See 423 F. Supp. at 707.

The District Court dismissed the complaint as well as a first amended complaint on two occasions prior to the opinions which are the subject of this appeal. In each instance, the dismissal was without prejudice so as to accord the *pro se* plaintiff an opportunity to replead her claim with sufficient specificity to withstand defendants' motions to dismiss. 423 F. Supp. at 707. On April 8, 1976 plaintiff filed her second amended complaint which became her final pleading and was the subject of the District Court's opinions dismissing the complaint as to the federal defendants among others and thereafter granting summary judgment in favor of the remaining defendants.

That complaint, which contains 46 paragraphs, can best be described as vague and conclusory. Plaintiff charges that since at least 1967 the federal defendants have conspired with the other named defendants to retaliate against plaintiff for her activities in behalf of various causes (human rights, integration, separation of church and state, sexual freedom and opposition to American

involvement in Indochina). As a result of these activities, plaintiff "became the subject of intrusive counter-intelligence actions and files, conducted and maintained by a Special Operations Group within the Central Intelligence Agency known as 'Operation Chaos' . . ." (Second Amended Complaint, ¶ 14 \*). In addition, unidentified federal agencies have allegedly classified plaintiff as an "undesirable". Said unidentified agencies have in turn communicated this classification to the defendant academic institutions thereby unlawfully precluding her admission to various doctoral and federally-sponsored research programs maintained by the nonfederal defendants, notwithstanding her alleged qualification for admission to such programs. These federal agencies are alleged to have directed the nonfederal defendants to reject plaintiff's application to the aforementioned programs (SAC ¶ 25), and to have kept the activities of the nonfederal defendants under surveillance in order to assure their compliance with these directions (SAC ¶ 33). Finally, plaintiff alleges that as a result of her application to the aforementioned academic programs, she was subjected to "extensive personality investigation" by the unidentified federal agencies and that in 1969 said investigation included:

an intensive wire-tapping and other counter-intelligence check, which included Armed Services cooperation in commanding persons in the Reserve who had been intimate with Plaintiff to reveal details of their relationship with Plaintiff. (SAC ¶ 17d)

The individual federal defendants, or their subordinates, are also alleged to have obstructed an unidentified "labor-retaliation grievance on behalf of the American Philosophical Association" and to have dissem-

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\* References to the second amended complaint are hereafter designated "SAC—".



inated false and damaging information to an official of that association (SAC ¶ 44). It should be noted that this act is alleged to have been committed by one or more of the 23 individually named defendants, by themselves or by their respective subordinates.

The relief sought in the complaint—the only element thereof stated with any specificity—is the following (SAC *Wherefore Clause*):

(a) Compensatory and punitive damages against all defendants in the amount of \$5,000,000;

(b) Declaratory judgment that defendants' activities described in the complaint are illegal and unconstitutional;

(c) Convening of a grand jury to investigate the allegations in the complaint; and

(d) A mandatory injunction or writ of mandamus ordering the defendants to produce before the Court for delivery to Plaintiff all files, reports, records, photographs, data computer tapes and cards, and all other materials derived from Defendants' illegal and unconstitutional activities relating to Plaintiff or any of her immediate co-workers, teachers, friends, union and/or professional association representatives, for the purpose of use at trial and before a grand jury.

On November 18, 1976, Judge Weinfeld filed an extensive opinion dismissing the second amended complaint as to all defendants but certain employees of BHE and of CUNY. As to the federal defendants, the Court held that plaintiff had failed to comply with the pleading requirements of Rule 8(a)(2) of the Federal Rules of Civil Procedure, notwithstanding the benefit of two opportunities to replead. The Court also concluded that the second amended complaint was subject to dismissal on the grounds that it had not alleged with sufficient particularity any overt acts in which the federal



defendants engaged which were reasonably related to the promotion of the claimed conspiracy; and that a conspiracy claim against federal officials must allege the defendant's direct and personal responsibility for the purportedly unlawful conduct of his subordinates. Finally, the Court held that no jurisdictional basis existed to sue the United States itself for damages, declaratory or injunctive relief. 423 F. Supp. 713-14.

On July 27, 1977, Judge Weinfeld entered a second opinion wherein he granted summary judgment in favor of the remaining defendants whose motion to dismiss had previously been denied. That opinion has not yet been reported.

## ARGUMENT

### POINT I

**The District Court Properly Dismissed The Complaint As To The United States And The Individual Federal Defendants In Their Official Capacity For Lack Of Subject Matter Jurisdiction.**

#### **A. The Claim For Damages**

Plaintiff predicated jurisdiction upon various provisions of the Constitution and unspecified civil rights statutes. The only arguably relevant civil rights statute is 42 U.S.C. § 1985 which proscribes conspiracy to interfere with an individual's civil rights and establishes a right of action for the recovery of damages against "persons" engaging in such conspiracy. The statute, however, is limited on its face to *persons* participating in the proscribed conspiracy. The United States is not a person within the meaning of the statute and therefore

cannot be made a defendant in a suit thereunder.\* *Davis v. United States*, 439 F.2d 1118 (8th Cir. 1971); *Smallwood v. United States*, 358 F. Supp. 398 (D. Mo.), *aff'd*, 486 F.2d 1407 (8th Cir. 1973); *Broome v. Simon*, 255 F. Supp. 434 (D. La. 1966). Cf. *Monroe v. Pape*, 365 U.S. 167 (1961); *United States ex rel. Lee v. Illinois*, 343 F.2d 120 (7th Cir. 1965).

As is well established, the United States may not be sued without its consent, and a party seeking to avail himself of a consent to suit must comply strictly with its terms. *United States v. Testan*, 424 U.S. 392 (1976); *United States v. Sherwood*, 312 U.S. 584 (1941); *Brown v. General Service Administration*, 507 F.2d 1300 (2d Cir. 1975), *aff'd*, 425 U.S. 820 (1976). The only arguable jurisdictional basis for recovery of damages against the United States would be a tort claim pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671, *et seq.*

Section 2675(a) of the Act, 28 U.S.C. § 2675(a), provides in pertinent part as follows:

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

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\* 18 U.S.C. § 2520 which provides for recovery of civil damages for illegally intercepted wire or oral communications is similarly limited to the *person(s)* engaging in the proscribed activity.



The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

Accordingly, in order for plaintiff to obtain judicial review of her claim, she must first have presented it to the appropriate federal agency for administrative action. The filing of an administrative claim is an absolute prerequisite to the maintaining of the claim and cannot be waived. *Best Bearing Co. v. United States*, 463 F.2d 1177 (7th Cir. 1972); *Mayo v. United States*, 407 F. Supp. 1352 (E.D. Va. 1976). Failure to allege in the complaint the presentation of the claim to the appropriate federal agency and a final disposition of the claim by the agency is a deficiency sufficient to warrant dismissal of the complaint. *Altman v. Connally*, 456 F.2d 1114, 1116 (2d Cir. 1972).

Inasmuch as plaintiff has failed to allege the filing of the requisite administrative claim and therefore presumably has never filed any such claim, she failed to satisfy the jurisdictional requirements of the FTCA. Accordingly, the District Court was without jurisdiction to consider plaintiff's claim for damages against the United States or the individual federal defendants in their official capacity.

## **B. The Claim For Declaratory Relief**

The District Court also concluded that it lacked jurisdiction to grant the declaratory relief sought in the complaint. The Declaratory Judgment Act, 28 U.S.C. § 2201 does not operate to waive sovereign immunity or to confer jurisdiction over the United States, but rather merely enlarges the remedies available once jurisdiction



has been established. *Skelley Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Small v. Kiley*, Dkt. No. 76-6162, slip op. 668 at 2224n.1 (2d Cir., March 9, 1977); *Zito v. Tesoriero*, 239 F. Supp. 354 (E.D.N.Y. 1965). Similarly, none of the statutes or provisions of the constitution cited in the complaint constitute a waiver of sovereign immunity or create a basis of jurisdiction over the claims raised herein.\* See *Lynch v. United States*, 292 U.S. 571 (1934); *Commonwealth of Kentucky ex rel. Hancock v. Ruckelshaus*, 362 F. Supp. 360, 368 (D. Ky. 1973), *aff'd*, 497 F.2d 1172 (6th Cir. 1974), *aff'd sub nom. Hancock v. Train*, 426 U.S. 167 (1976).

Plaintiff also sought to compel the production of all information which relates to defendants' alleged unlawful activities regarding plaintiff. To the extent that this demand is directed toward the federal defendants, it is necessarily a demand upon the United States or upon the individual federal defendants acting in their official capacities. As with plaintiff's claim for damages and declaratory relief, the claim for mandamus and injunctive relief must similarly be predicated upon a consent to suit with the terms of which plaintiff has strictly complied. In effect, plaintiff asked the District Court to compel the Government to act.

As this Court recognized in *Brown v. General Services Administration*, *supra*, 507 F.2d at 1307, the United States must specifically waive its sovereign immunity before the Government can be subject to a judgment which would "compel it to act." See *United States v. Testan*, *supra*. The only two statutes which arguably

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\* Reference is made in the complaint to "Titles IX and VI of the Federal Higher Education Act" (SAC ¶ 1) which presumably refers to 20 U.S.C. §§ 1121-1132 and 1134-1135. None of these statutes constitute a basis of jurisdiction over plaintiff's claims against the United States.

constitute a waiver of sovereign immunity in this instance are the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Both acts, however, require an individual to exhaust administrative remedies prior to commencing an action. See 5 U.S.C. § 552(a)(4)(B); 5 U.S.C. § 552a(g)(1).

Plaintiff has not alleged any effort on her part to obtain the desired information through available administrative channels, let alone that such channels have been exhausted. Regardless of whether the desired information exists and, if so, whether its disclosure would ultimately be mandated by the Freedom of Information or Privacy Acts, it is clear that a prerequisite to the sovereign's consent to suit under either Act is the prior exhaustion of administrative remedies. As the District Court properly found, plaintiff failed to exhaust those remedies. 423 F. Supp. at 714 n.26. See *Tuchinsky v. Selective Service System*, 418 F.2d 155 (7th Cir. 1965).

### C. The Claim For The Convening Of A Grand Jury

Plaintiff also sought to compel the Government to convene a grand jury for the purpose of investigating the allegations made in the complaint. The only possible jurisdictional basis for the desired relief would be 28 U.S.C. § 1361 which grants jurisdiction to district courts over mandamus actions against federal officials. It is well settled, however, that the question of whether and when prosecution is to be instituted, including the convening of a grand jury, is within the discretion of the Attorney General. Mandamus will not lie to control the exercise of that discretion. *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973); *Powell v. Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965), cert. denied, 384 U.S. 906 (1966); *Lovullo v. Froehlke*, 468 F.2d 340 (2d Cir. 1972), cert. denied, 411



U.S. 918 (1973); *In Re April 1956 Term Grand Jury*, 239 F.2d 263, 268-269 (7th Cir. 1956). As this Court recently observed in *Inmates of Attica Correctional Facility v. Rockefeller, supra*, 447 F.2d at 380-381, wherein plaintiffs sought to compel by mandamus the investigation and prosecution of state officials for alleged violations of their civil rights:

These difficult questions engender serious doubts as to the judiciary's capacity to review and as to the problem of arbitrariness inherent in any judicial decision to order prosecution. On balance, we believe that substitution of a court's decision to compel prosecution for the U.S. Attorney's decision not to prosecute, even upon an abuse of discretion standard of review and even if limited to directing that a prosecution be undertaken in good faith, see Note, Discretion to Prosecute Federal Civil Rights Crimes, 74 Yale L.J. 1297, 1310-12 (1965), would be unwise.

## POINT II

### **The District Court Properly Dismissed The Complaint Against The Individual Federal Defendants In An Individual Capacity For Failure To State A Claim Upon Which Relief Could Be Granted.**

Although the individually named federal defendants are charged with participation in a far reaching international conspiracy, the allegation of specific activity on their part is limited to the following paragraphs in the complaint:

29. On information and belief, Defendants RICHARD KLEINDIENST, WILLIAM SAXBE, EDWARD H. LEVI, HENRY KISSINGER, have covered up and are continuing to cover up evidence



of unlawful counterintelligence activity and federal harassment of persons who are members of the class action 75 Civ. 1773 (JG) [\*], to which Plaintiff alleges membership, and are hence conspiring to fail to prevent a conspiracy to interfere with the civil rights of Plaintiff by instructing their subordinates to give false information in response to Freedom of Information Act requests, and further to fail to investigate civil rights complaints brought by these persons through the Equal Employment Opportunity Commission, wherein Plaintiff's grievances were misprocessed.

44. Alternately or concurrently, that one or more of the individual defendants herein, RICHARD KLEINDIENST, WILLIAM SAXBE, EDWARD H. LEVI, HENRY KISSINGER, ALFRED A. GIARDINO, ROBERT J. KIBEE, DAVID NEWTON, HAROLD H. PROSHANSKY, HANS J. HILLERBRAND, ARNOLD KOSLOW, ABRAHAM EDEL, JULIUS ELIAS, GERALD MYERS, ANDREW J. McLAUGHLIN, JASON SAUNDERS, VIRGINIA HELD, PETER CAWS, RUDOLPH GREWE, C.S. HONG, ROBERTO THORNTON, NORMA REES, NAPTHALI LEWIS, KURT SCHMELLER, or one of their subordinates acting on their instructions, prevented Professor MOTHERSILL from investigating Plaintiff's labor-retaliation grievance on behalf of the American Philosophical Association and further, disseminated false and damaging in-

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\* This refers to an action allegedly pending in the United States District Court for the District of Columbia, *Halkin v. Helms*. Plaintiff claims to be a member of the purported plaintiff class in that action and apparently claims that the federal defendants are withholding information from that purported class.

formation regarding Plaintiff to Professor MOTHERSILL to be withheld from Plaintiff in "strictest confidence", violates Title VII of the Civil Rights Act of 1964, as amended, and is an act which is part of the conspiracy violating 42 U.S.C. Section 1985 and the First Amendment.

46. That individual defendants RICHARD KLEINDIENST, WILLIAM SAXBE, EDWARD H. LEVI, HENRY KISSINGER, MARY MOTHERSILL, ALFRED A. GIARDINO, ROBERT J. KIBBEE, DAVID NEWTON, HAROLD M. PROSHANSKY, HANS J. HILLERBRAND, ARNOLD KOSLOW, ABRAHAM EDEL, JULIUS ELIAS, GERALD MYERS, ANDREW J. McLAUGHLIN, JASON SAUNDERS, VIRGINIA HELD, PETER CAWS, RUDOLPH GREWE, C.S. HONG, ROBERTA THORNTON, NORMA REES, NAPTHALI LEWIS, KURT SCHMELLER, are each and everyone of them withholding evidence and testimony of unlawful federal and/or municipal interference with Plaintiff's academic and/or professional career and right to equal opportunity in both education and employment, is an act which forms part of a conspiracy to interfere with Plaintiff's civil rights under 42 U.S.C. Section 1985, the Civil Rights Act of 1964, as amended, the Federal Higher Education Act, and the First Amendment.

Judge Weinfeld properly found that these allegations were speculative and conclusory and clearly failed to state with the requisite particularity any claim upon which relief could be granted. As stated by the Court:

Although not much amenable to legal analysis, the complaint does allege some sort of vast but peculiarly impenetrable conspiracy to prevent plaintiff from continuing her education in any re-



search projects. But were the vague, conclusory allegations contained in the complaint deemed sufficient to withstand a motion to dismiss, an unwarranted burden of evidence would be placed on the movants . . .

Although pro se civil rights complaints must be viewed with some latitude, liberal construction of pleadings should not be permitted to override completely the rights of defendants. Plaintiff simply fails to support her allegations with any factual details that — even imaginatively considered — could connect the federal defendants to any conspiracy to deprive her of her rights or to any actual deprivation of her rights. The acts alleged in furtherance of the purported conspiracy are mere speculations not supported by factual averments and, in any event, are not alleged with particularity.

423 F. Supp. at 713-714.

The District Court's analysis followed the principles established by this Court in *Black v. United States*, 534 F.2d 524 (2d Cir. 1976). In *Black*, the plaintiff alleged that IRS agents had harassed him by stating to his clients that the IRS intended to get him and by insinuating in conversations with him that he was biased. This Court dismissed the complaint, holding that the pleadings requirements justifiably imposed on plaintiffs proceeding against state officials under 42 U.S.C. § 1983 are applicable to actions against federal officials and, consequently, that *the doctrine of respondeat superior would not cause a federal official to be personally liable for the acts of his/her subordinates*:

The Courts . . . have been careful to couple this expansion in the liability of executive officers with new and necessary safeguards. In an effort



to limit vexatious litigation and to minimize interference with the orderly workings of government, it is required in suits against state officials under 42 U.S.C. § 1983 that the plaintiff allege the defendant's direct and personal responsibility for the purportedly unlawful conduct of his subordinates. In *Johnson v. Glick*, 481 F.2d 1028, 1034 (2d Cir.), cert. denied, 414 U.S. 1033 (1973), we stated with regard to state officials that 'the general doctrine of *respondeat superior* does not suffice . . .' We see no reason why the pleadings requirements should be any different in actions against federal officials. [Emphasis added]

534 F.2d at 527-28. The principles espoused in *Black* are applicable to the instant complaint and the specificity requirements for pleadings under 42 U.S.C. § 1983 were properly imposed on Plaintiff's second amended complaint. See *Jacobson v. Organized Crime & Racketeering Section*, 544 F.2d 637 (2d Cir. 1976), cert. denied, 45 U.S.L.W. 3666 (U.S. April 5, 1977); *Martin v. Merola*, 532 F.2d 191 (2d Cir. 1976); *Fine v. City of New York*, 529 F.2d 70 (2d Cir. 1975).

The above quoted paragraphs of the second amended complaint clearly do not contain the specificity mandated by *Black*. The sole reason for naming Messrs. Levi, Kissinger, Saxbe and Kleindienst is that they were, at the filing of the complaint, present and/or past high officials of the Government. Paragraphs 29 and 46 of the second amended complaint charge that these defendants are withholding information regarding the conspiracy to deprive plaintiff of her various rights. This charge is conclusory and is not supported by any

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\* As shown in Point I, to the extent that the complaint is directed against the individual federal defendants in their official capacity, it fails to state a claim over which the District Court had jurisdiction.

specific allegations regarding the nature of the information withheld, the efforts made by plaintiff to obtain said information, the nature of the requisite *personal* involvement of the defendants in withholding the information or even the existence of any personal duty on their part to disclose the desired information. Indeed, the only legal obligation mentioned in these paragraphs is the Freedom of Information Act, 5 U.S.C. § 552. As shown above, however, plaintiff has failed to allege that she utilized, let alone exhausted, the administrative remedies available under that Act.

Similarly, paragraph 44 of the second amendment complaint contains only a conclusory allegation that one or more of the 23 individual defendants, including the individual federal defendants, or their subordinates, have prevented a member of the American Philosophical Association from investigating some unspecified grievance and have disseminated false and damaging information to that member. There is again a complete absence of specificity regarding the requisite *personal* involvement of the individual federal defendants in the alleged investigation or in the alleged dissemination of false information, the nature of the information allegedly disseminated, the means of prevention of said investigation, or even that they had any knowledge whatsoever of the existence of the investigation—if it does in fact exist.

Thus, plaintiff failed to allege a single fact in support of the conclusionary allegations made with respect to the individual federal defendants. As this Court recently held in *Koch v. Yunich*, 533 F.2d 80, 85 (2d Cir. 1976):

Complaints relying on the civil rights statutes are plainly insufficient unless they contain some specific allegations of fact indicating a deprivation of civil rights, rather than state simple conclusion.



The District Court properly found that plaintiff had failed to meet these pleadings requirements and that her second amended complaint therefore had failed to state a claim with respect to the individual federal defendants upon which any relief could be granted.\*

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\* The District Court also found that plaintiff had failed to comply with Rule 8(a)(2) of the Federal Rules of Civil Procedure which requires that a complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief. Judge Weinfeld found that despite her repeated opportunity to replead, plaintiff was unable to comply with this requirement and that the complaint was therefore subject to dismissal.

While it is true that pro se pleadings are to be read with an understanding tolerance, see *Haines v. Kerner*, 404 U.S. 519 (1972), even a pro se plaintiff may not repeatedly ignore the requirements of the Rule. See *Place v. Shepherd*, 446 F.2d 1239, 1244, 1246 (6th Cir. 1971); *Shakespeare v. Wilson*, 40 F.R.D. 500 (S.D. Cal. 1966); *Boruski v. Stewart*, 381 F. Supp. 529, 533 (S.D.N.Y. 1974); *Prezzi v. Berzak*, 57 F.R.D. 149 (S.D.N.Y. 1972); *Burton v. Peartree*, 326 F. Supp. 755, 759 (E.D. Pa. 1971). The complaint does not contain any statement showing that plaintiff is entitled to relief. At best it is as Judge Weinfeld found a redundant, conclusory and confusing pleading which fails to give any notice of the claims which plaintiff wishes to assert. It being clear that further opportunity to replead could not remedy this defect, the complaint was properly dismissed with prejudice for failure to comply with the Rule.



## CONCLUSION

**The judgment of the District Court should be affirmed.**

Dated: New York, New York  
December 16, 1977

Respectfully submitted,

ROBERT B. FISKE, JR.,  
*United States Attorney for the  
Southern District of New York,  
Attorney for Federal Defendants-  
Appellees United States of Amer-  
ica, Henry Kissinger, Edward H.  
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AFFIDAVIT OF MAILING

State of New York ) ss  
County of New York )

Marian J. Bryant being duly sworn,  
deposes and says that she is employed in the Office of the  
United States Attorney for the Southern District of New York.

That on the  
two copies  
16th day of December 19 77 she served ~~except~~ of the  
within Brief for Federal Defendants-Appellees

by placing the same in a properly postpaid franked envelope addressed:

1. Anna Selma Vinje Morpurgo, Box 1091, Sag Harbor, NY 11963
2. Rosemary Carroll, Esq., Office of Corporation Counsel NYC, Municipal Building, NY, NY 10007
3. D. Nicholas Russo, Esq., Professional Staff Congress/CUNY, 25 West 43rd Street, NY, NY 10036
4. Edwin L. Smith, Esq., Anthony M. Lanzone & Associates, 26 Broadway, NY, NY 10004
5. Marleigh Dover Lang, Esq., Equal Employment Opportunity Comm., 2401 E Street, N. W., Washington, D. C. 20506
6. Robert G. Desmond, Esquire., 60 East 42nd Street, NY, NY 10017  
and one (1) of Brief for Federal Defendants-  
Appellees to
7. Jackson, Nash Brophy, Barringer & Brooks, 330 Madison Ave., NY, NY 10017

And deponent further says s he sealed the said envelope s and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

16th day of December, 1977

~~PAULINE P. TROIA  
Notary Public State of New York  
No. 01469001  
Qualified in New York County  
Commission Expires March 30, 1978~~

PAULINE P. TROIA  
Notary Public, State of New York  
No. 31-4632381  
Qualified in New York County  
Commission Expires March 30, 1978



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Page 2

State of New York       )  
County of New York     )     ss

Marian J. Bryant  
deposes and says that she is employed in the Office of the  
United States Attorney for the Southern District of New York.

That on the

16th day of December 19 77 she served a copy of the  
within Brief for Federal Defendants-Appellees

by placing the same in a properly postpaid franked envelope  
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One St. Andrews Plaza, Borough of Manhattan, City of New York.

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Marian J. Bryant

16th day of December, 19 77

Pauline P. Troia  
PAULINE P. TROIA  
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Commission Expires March 30, 1978